BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ALLEN MITCHELL, Claimant, v. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant.	**IC 2005-528356** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** Filed June 20, 2017

INTRODUCTION AND PROCEDURAL HISTORY

This matter came before the Industrial Commission for hearing on August 16, 2016. Appearing for Claimant was Clinton Miner. Appearing for the State of Idaho, Industrial Special Indemnity Fund (ISIF), was Paul Augustine. On July 18, 2016, the Commission filed a notice of hearing. On July 21, 2016, ISIF filed a motion to add an additional issue for hearing, related to whether Claimant's claim against the ISIF was barred by the applicable statute of limitation. At the August 16, 2016 hearing, the parties confirmed the hearing issues to be the following:

1. Whether Claimant is totally and permanently disabled, either under the 100% method or according to the odd-lot doctrine;

2. Whether ISIF is liable under Idaho Code § 72-332;

3. Whether any preexisting injury or condition was exacerbated by the last industrial accident;

4. Whether any preexisting injury or condition combined with the last industrial accident to render Claimant totally and permanently disabled;

5. Whether any preexisting injury or condition constituted a hindrance or obstacle to employment;

6. If Claimant is found to be totally and permanently disabled, whether the disablement was proximately caused by the natural progression of Claimant's preexisting injury or condition or by the last industrial accident;

7. Whether Claimant's claim against the ISIF is barred by the applicable statute of limitation. HT, p. 6, ln. 6 – 7, ln. 13.

At hearing, Claimant and Claimant's wife Marilyn Mitchell testified. The testimony of Nancy Collins, Ph.D., was taken by way of post-hearing deposition on October 7, 2016.

This matter has been the subject of prior proceedings before the Commission. Claimant and ISIF vigorously disputed whether Claimant's case should be barred by the applicable statute of limitation and argued that matter before the Commission. The Commission issued an order on August 16, 2016 which reasoned that Claimant's receipt of income benefits through the lump sum settlement with Employer implicated the provisions of Idaho Code § 72-706(3) and provided Claimant one year from the date of those payments to file his claim against the ISIF. Because Claimant filed his claim against the ISIF within one year of the lump sum settlement, the Commission found that Claimant's claim was not barred by the applicable statute of limitation. Rather than pursue a permissive appeal at that juncture, ISIF requested that the Commission preserve the statute of limitation issue as a hearing issue.

At the August 16, 2016 hearing, the Commission admitted into evidence Claimant's additional Exhibits 1 – 32 and ISIF's Exhibits 1 – 6.

CONTENTIONS OF THE PARTIES

Claimant contends that on or about December 6, 2005, he suffered an accident arising out of and in the course of his employment, and as a consequence of this accident and his preexisting conditions, he is totally and permanently disabled under the odd-lot doctrine. Claimant argues

that he has a number of preexisting physical impairments, which were manifest, constituted subjective hindrances, and combine with his last industrial accident to implicate ISIF liability.

ISIF argues that should the Commission find Claimant totally and permanently disabled, that none of Claimant's preexisting impairments constituted a subjective hindrance to Claimant, nor did they combine with the subject accident to cause total and permanent disability. ISIF also contends that Claimant's claim against the ISIF is barred by the statute of limitation.

FINDINGS OF FACT

1. Claimant was 66 years old as of the date of hearing. Claimant grew up in the Riverside, California area and graduated from Riverside High School in 1969. Following graduation, Claimant enlisted in the Army and served for two years. Claimant's military tasks were varied and included basic training and obstacle courses, firearm and grenade proficiency, some medic training, and clerical work in a legal setting. Claimant testified that he was relegated to clerical work due to a left foot tendon injury which made him unable to wear combat boots. Following his honorable discharge, Claimant enrolled in college courses at Riverside City College and obtained an associate's degree in criminal justice.

2. From approximately 1973 to 1976, Claimant worked for Riverside County, providing security. His duties included parking lot patrol and supporting nurses and doctors with mental health patients, i.e., subduing and transferring patients. This job required Claimant to complete a PC832 course, which he described as a modified version of the Idaho Peace Officer Standards and Training (POST) course and required a lot of walking around the facility. Claimant testified that his left foot caused him some problems but that he "learned to live with it, basically." HT, p. 26, ln. 24-25.

3. After a series of odd jobs, including a stint in pest control, Claimant worked for the Riverside County Sheriff's Department as a transportation officer for about three years, which involved transporting and searching inmates, and making arrests. In 1984, Claimant broke his right elbow and left arm after falling from a ladder. Claimant had surgery and was off work for seven months. Though Claimant described his recovery as "85%," with some limitations straightening his right arm, Claimant's elbow injury never resulted in any physician-imposed restrictions that affected Claimant's ability to perform his job. (HT, p. 62).

4. In 1988, Claimant was hospitalized for complications from Wolff-Parkinson-White (WPW) syndrome, a heart nerve condition. Claimant had a cardiac catheterization after a month-long history of exertional left-sided chest pressure associated with indigestion and a recent abnormal nuclear exercise stress test. (C. Exh 27, p. 4.) Claimant testified that since this hospitalization, he has had episodes of heart rhythm difficulties, but nothing that stopped him from working. (HT, p. 30, ln. 11 – 20.)

5. Claimant suffered an industrial accident when an inmate slammed the jail door into Claimant's right elbow. (HT, p. 31, ln. 19 – 32, ln. 6.) Claimant missed several days at work and took pain medication. Claimant described some long-term problem with pain, numbness, and lack of strength in the arm, which he attributed to this incident, but maintains that this did not prevent him from working.

6. Thereafter, Claimant attended academy training, passed the physical exam, and became a deputy sheriff. Claimant's assignments rotated between the jail and patrol. Claimant then became a deputy marshal and assisted with court security, evictions, levies, and family law cases. In total, Claimant spent eighteen years with the marshal's department. Due to organizational changes, Claimant's position was transferred into a deputy sheriff position. While

Claimant believed his blood pressure and diabetes caused him to occasionally miss work and slow down, Claimant was consistently able to pass the physical and agility tests required by the Riverside County Sheriff's Department. (HT, p. 61) Claimant also enjoyed many recreational pursuits as part of an active lifestyle, including tennis, biking up to 30 miles, golfing, and jogging.

7. In 1995, Claimant moved to Homedale, Idaho, and worked for Parma Company for approximately three to four years as a driller, a heavy duty job involving sharpening bits and drilling into steel to build farm equipment. Claimant was unclear on details, but insists that he injured either his lower or upper back when a large piece of drill machinery knocked him down. Claimant had occasional doctor visits, but no restrictions or impairment resulted from this incident.

8. After a series of odd jobs, in 1998, Claimant worked at Hi-Micro Tool Corporation in Meridian, Idaho. Claimant was responsible for building tools or making tools on the grinder and profilers. (HT, p. 41.) Claimant had a work accident that "tore the muscles off" either his right hand or his left arm, but he was released to full-duty work. (HT, pp. 42; 67.)

9. Thereafter, Claimant worked part-time security for Boise State University in Nampa, Idaho. (HT, p. 42.) Claimant briefly returned to pest control for Gustafson Chemical in 2000, where his job duties required mixing chemicals and lifting 60-pound bags into tanks. (HT, p. 43.) Claimant's job duties were physically demanding, but he felt he was "starting to slow down a little bit." (HT, p. 44.) Claimant briefly returned to Boise State University, and then started at Corrections Corporation of America (CCA), a private security firm in Kuna, Idaho, before he started working as outside security for the Idaho Department of Correction, guarding

the perimeter of the fence. (HT, pp. 44-45.) Claimant did not exhibit any problems which prevented him from completing his job responsibilities. (HT, p. 68.)

10. Upon urging from his employer, Claimant bid for an "inside" job to improve his career options. (HT, p. 46.) Claimant secured a job in B Block, the area housing the prison population on death row and administrative segregation. (HT, p. 46.) Claimant described his job duties as fairly strenuous with handcuffing, bending, squatting, searching cells, and restraining or chasing prisoners. (HT, pp. 47-48.) At this time, Claimant reported his pancreatis caused him to miss work. (HT, p. 47.) Claimant also described blurry vision due to diabetic neuropathy, which made it difficult to handle a firearm. (HT, p. 48.) Claimant's vision complaints did not result in any physician-imposed restrictions on firearm handling. Claimant was not under any physical restrictions or limitations by a physician, and Claimant passed his employment-required physical tests including the ability to perform a physical take down, without any special accommodations. (HT, pp. 68-69.)

11. The subject accident occurred on December 6, 2005. Claimant had finished a round of checking on inmates in their cells and returned to type notes on an inmate. Claimant slipped out from his chair and fell flat on his back on the concrete floor. (HT, p. 51.) Claimant reported back pain, and reported the incident to the watch commander, but finished his shift. Claimant sought treatment with Dr. Perkins, a chiropractor who had previously treated Claimant for a horse riding accident, but had never imposed permanent restrictions on Claimant. (HT, p. 52.)

12. On January 8, 2006, Claimant went to the West Valley Hospital ER, and had x-rays and received skeletal muscle relaxers and painkillers. (C Exh. 5, pp. 169-70). Claimant was referred to a spine surgeon. Dr. Silver, an orthopedic surgeon and sports medicine physician,

reviewed the x-rays and found minimal joint space narrowing at L5-S1 with no fracture or dislocation. (C Exh. 5, p. 170.)

13. In 2006, Claimant injured his knee while walking on a treadmill. Claimant started occasionally ambulating with a cane; Claimant presently ambulates almost exclusively with the assistance of a cane. Around February 2006, Claimant initiated the retirement process with employer. (C. Exh. 32, p. 3.)

14. Michael Gustavel, M.D., an orthopedic surgeon, evaluated Claimant and assessed low back pain/radicular pain, and prescribed physical therapy, NSAIDS, and pain medication. (C. Exh. 7; ISIF Exh. 1, p. 10.) Dr. Gustavel anticipated that Claimant would be able to return to work as a correctional officer within three months. (ISIF Exh. 1, p. 11.) Dr. Gustavel believed that Claimant could resume light duty/desk work with breaks for standing and sitting. (ISIF Exh. 1, p. 11.) In April 2006, Dr. Gustavel referred Claimant for epidural steroid injections, and restricted him from working for four weeks. On April 21, 2016, Claimant received epidural steroid injections, which proved ineffective in managing his pain. Dr. Gustavel recommended a second opinion with Kenneth Little, M.D, a neurological surgeon.

15. On May 8, 2006, Claimant had an MRI. By letter dated May 10, 2006, Dr. Little discussed Claimant's radiology findings with Dr. Gustavel. Dr. Little noted mild degenerative disc changes without neural foraminal narrowing, lateral recess or central canal stenosis, and no compressive lesions to explain Claimant's leg pains. Dr. Little suspected possible facet-mediated pain and suggested possible percutaneous facet neurectomies. (ISIF Exh. 1, p. 13; C. Exh. 7, p. 4.) "Essentially, Mr. Mitchell's lumbar spine appears quite well radiographically. He does have some mild degenerative facet changes though these are not advanced." (ISIF Exh. 5, p. 200; C. Exh. 7, p. 4.) Dr. Little recommended a repeat of the medial branch blocks without

simultaneous epidural steroid injections to investigate facet mediated pain. (ISIF Exh. 5, p. 200; C. Exh. 7, p. 4.)

16. On June 19, 2006, Richard Silver, M.D., conducted an IME for Surety. Dr. Silver diagnosed Claimant as follows:

> 1.) Claimant has a contusion of his lumbosacral spine with acute traumatic lumbodorsal musculotendinous sprain/strain and acute traumatic myofascial fibrocytic reaction of the right and left GMO (gluteus maximus origin) and PSIS (posterior superior iliac spine) areas. He has also developed a chronic pain syndrome secondary to the recalcitrant nature of his exogenous obesity and his heat therapeutic modalities. One of his real problems is the numbness of the anterior thigh bilaterally, which makes no sense from an anatomic, biomechanical, nor pathophysciological standpoint. There is no evidence of any focal neurological deficits. The Claimant does not have any evidence of meralgia paresthetica. The numbness of the thighs could very easily be due to diabetic peripheral neuropathy. No electrophysiological studies have been performed.
>
> 2.) The claimant has internal derangement of the right knee, totally unrelated, neither directly or indirectly to the industrial condition in question of 12/06/05. Claimant was injured at home while doing home physical therapy walking on a treadmill when his right knee gave way. This occurred on or about 01/24/06. The office note of importance from Dr. Michael J. Gustavel, MD, on 01/30/06 stated that the claimant was examined on 01/24/06. That evening he was on a treadmill and had a sudden onset of medial knee pain, which has become significantly worse. He was using a cane. An MRI was performed and documented on 01/31/06 shows acute trauma. Surgical intervention is not necessary. He was better by 02/27/06. He has actually given up the cane. He was having pain over the posterior and posteromedial aspect of his right knee. There is no ligamentous instability. The claimant is with improving knee pain, and very little in the way of symptomatology.
>
> Claimant's Exh. 5, p. 165.

Dr. Silver recommended weight reduction, total cessation of any and all forms of heat therapeutic modalities, cryotherapy, aqua therapy for walking and exercising, complete control of his diabetes mellitus and hypertension, prescription drugs (Indomethacin, Flexeril, and Cymbalta), physical therapy, a diuretic for his blood pressure and peripheral edema, and a return to work in a sedentary capacity. (C. Exh. 5, pp. 164-165.) Dr. Silver did not have a job

description for the correctional officer position and assumed (incorrectly) that it was light duty. Dr. Silver opined that Claimant had not suffered any partial permanent impairment due to his industrial accident, as "there is no documentation of any loss of functionality." (C. Exh. 5, p. 167.)

17. Dr. Silver conducted movement, range of motion, and reflex tests. (C. Exh. 5, pp. 176-177.) He reported that Claimant's straight leg raising test was negative, straight leg raising sitting was 90/90, and straight leg raising supine was 65-70/90. (C. Exh. 5, p. 176.) Dr. Silver found no referred or radicular pain in the lumbosacral spine or the upper or lower extremities, and Lasègue's, Bragard's, and Naffziger's tests were negative bilaterally. The claimant had no subjective complaints, nor any objective clinical findings, through the ROM of the entire vertebral spine, especially the L-S spine. (C. Exh. 5, p. 176.) Claimant did show "severe exquisite pain with palpation and percussion of the greater trochanteric areas bilaterally with severe greater trochanteric bursitis reaction," but the same did not recreate the numbness or tingling in his anterior thighs. The tests for meralgia paresthetica were negative, and the CTPP&S (color, temperature, perspiratory phenomenon, pulses and sensation), NAT (nerve artery, and tendon), M&N (motor and neurological), and ROM (range of motion) were "completely within normal limits in the upper and lower extremities bilaterally with "no evidence of any focal neurological deficit."" (C. Exh. 5, p. 176.) Similarly, there were no pathological reflexes noted and no focal neurological deficits in the upper or lower extremities. Id. Dr. Silver was concerned about edema in Claimant's lower extremities and believes that the Claimant's "severe pain and the bursitis reaction in the greater trochanters bilaterally is a chronic-type problem." (C. Exh. 5, p. 177). Dr. Silver noted that Claimant's left foot, specifically the medial longitudinal plantar arch, was hypersensitive because of an old laceration.

Id. at 177. Claimant's knee examination showed normal range of motion in both knees, with right knee stiffness without any loss of functionality. (C. Exh. 5, p. 177.) Dr. Silver concluded that Claimant's knee examination was within normal limits bilaterally, and there was no loss of functionality of the right or the left knee. Id. Dr. Silver concluded that Claimant had:

> low back pain syndrome with acute traumatic lumbodorsal musculotendinous strain/sprain, and acute traumatic myofascial fibrocytic reaction right and left GMO (gluteus maximus origin) and PSIS (posterior superior iliac spine) area. This has caused him some pain and discomfort, and need for definitive care. In addition, he has developed greater trochanteric bursitis reaction of the hips bilaterally, totally unrelated to the industrial accident in question. He has also developed a right knee problem while working out at home on a treadmill, totally unrelated to the accident in question of 12/06/05.
>
> (C. Exh. 5, p. 180.)

18. On May 22, 2006, Dr. Gustavel reviewed Surety's surveillance tapes and discussed the tape. Dr. Gustavel confirmed that he did not believe Claimant was performing any activity that was too strenuous and affirmed his present restrictions. (ISIF Exh. 5, p. 199.)

19. On May 24, 2006, Dr. Little opined that he could not find "any substantial radiographic pathology and certainly no pathology for which an operative intervention would be appropriate. [He] suggested that he seek consultation with a pain specialist." (ISIF Exh. 5, p. 197; C. Exh. 7, p. 3.) Dr. Little wrote that "if Mr. Mitchell is disabled it is due to subjective symptoms rather than objective radiographic or physical examination findings." Id.

20. On July 27, 2006, Employer terminated Claimant as they were unable to offer any modified duty work to the Claimant.

21. On August 8, 2006, Dr. Gustavel restricted Claimant from lifting greater than 25 pounds, prolonged standing and walking, and minimal bending. (ISIF Exh. 1, p. 20.)

22. On August 8, 2006, Claimant began treatment with Richard A. DuBose, M.D., at the Idaho Pain Center. Dr. DuBose performed a bilateral denervation of the median nerves at

L4, L5, and S1 at the Treasure Valley Hospital and managed Claimant's pain medication thereafter.

23. On December 15, 2006, Dr. Gustavel assessed continuing back pain, recommended a second opinion from a spine surgeon, and referred Claimant back to Dr. DuBose. In the meantime, Dr. Gustavel recommended Claimant continue physical therapy. (ISIF Exh. 1, p. 21.)

24. On January 4, 2007, Dr. DuBose recommended a surgical consultation with Joseph M. Verska, M.D. (C. Exh. 2.) Dr. Verska met with Claimant and reviewed his MRIs. Dr. Verska assessed osteoarthritis with no evidence of disc herniation and lumbar degenerative disc disease with low back pain. (C. Exh. 3, pp. 9, 11.) Dr. Verska did not think that "any surgery is indicated or injections" and recommended Claimant start the LifeFit program. (C. Exh. 5, p. 68.)

25. Around March 2007, Claimant was admitted into the LifeFit program under the care of Robert H. Friedman, M.D. During his third or fourth week of the LifeFit program, Dr. Friedman admitted Claimant into the Idaho Elks Rehabilitation Hospital due to fluctuations in Claimant's blood glucose readings and blood pressure. (C. Exh. 5, p. 6.) Claimant returned to the LifeFit Program on March 30, 2007.

26. On April 2, 2007, Ms. Leah Padaca, ATC-L, conducted an FCE and opined that Claimant's assessment was an invalid representation of his present physical capabilities, because she believed that Claimant manipulated his efforts to function at less than his true safe capacity level. (C. Exh. 5, p. 104.) On April 4, 2007, Dr. Friedman opined that Claimant had reached maximum medical improvement (MMI). (ISIF Exh. 1, p. 23.) Dr. Friedman opined that Claimant had sustained a 6% permanent partial impairment, 50% of which was due to

preexisting conditions. (ISIF Exh. 3, p. 62.) Dr. Friedman subsequently issued temporary restrictions on avoiding prolonged low frequency vibrations and torquing maneuvers (combined bend/lift/twist) with the expectation that Claimant would be functioning within medium restrictions in ten weeks. (C. Exh. 5.) Dr. Friedman noted a KEY Functional Capacity Assessment was invalid, demonstrating a manipulated effort by Claimant, such that Claimant was performing at half of his capacity on the test compared to his daily therapy performance. (C. Exh. 5.) On April 5, 2007, Dr. Friedman approved Claimant to return to work as a correctional officer and recommended medium work restrictions, which are lifting 50 pounds occasionally and 25 pounds repetitively. Dr. Friedman attributed these medium-work restrictions to Claimant's preexisting degenerative arthritis in his back, not to his 2005 industrial accident. (C. Exh. 5, p. 112.)

27. On April 24, 2007, Dr. Gustavel was uncertain if he had much more to offer Claimant, although he supported the continuance of Claimant's treatment with Dr. DuBose for pain management issues. (C. Exh. 10, p. 43.) Dr. Gustavel did not relate Claimant's need for additional pain management treatment to the industrial accident. Employer/Surety discontinued Claimant's workers' compensation benefits. Claimant continued to seek medical treatment through his private insurance.

28. On May 2, 2007, David K. Anderson, M.D., radiologist, reported that Claimant's heart size was "mildly enlarged" with "no acute cardiopulmonary process found at this time." (C. Exh. 21, p. 57.)

29. Dr. DuBose continued Claimant's pain management. Notably, Dr. DuBose did not relate this additional treatment to Claimant's industrial accident. Dr. DuBose performed a selective nerve root injection and a percutaneous partial discectomy in September 5, 2007. By

September 2007, Dr. DuBose believed Claimant was doing very well and encouraged Claimant to slowly begin rehabilitation. (C. Exh. 2, p. 49.) In October 2007, Dr. DuBose documented that he was pleased with Claimant's good progress.

30. On October 22, 2007, RehabAuthoritiy stated that "(Patient) is a good candidate to return to work at a desk job. Asked him to reduce his pain meds as they do not seem to be increasing function." (C. Exh 15, p. 46.) Around November 2007, Rehab Authority discharged Claimant from their physical therapy program for noncompliance. (ISIF Exh. 4, p. 90.)

31. On December 12, 2007, Dr. DuBose noted that Claimant reinjured his back and that there was "no evidence of oversedation." (C. Exh. 2, p. 53.) On December 20, 2007, David Madden, M.D., (radiologist) interpreted Claimant's lumbar spine condition as follows:

> The gross alignment is satisfactory. The intervertebral disc spaces are fairly well maintained in height throughout. In the lower thoracic spine, there is moderate amount of early osteophyte formation/spondylosis. Vascular calcifications are seen in the descending aorta and abdominal aorta. No fracture or destructive process is noted. On the oblique projections and on the lateral projections, there is considerable hypertrophic degenerative change involving the facet joints particularly from the L3 level caudally which could predispose the patient to spinal stenosis.

(C. Exh. 6, p. 1.)

Dr. DuBose reviewed the MRI results and assessed degenerative changes of the lumbar spine. Dr. DuBose continued to offer facet block injections and denervation of the medial nerve branches at L3, L4, and L5. Dr. DuBose also recommended Claimant attempt to lose weight. (C. Exh. 2.) Dr. DuBose characterized Claimant's condition as being caused by Claimant's degenerative changes of the lumbar spine with no evidence of a compression fracture. (C. Exh. 2, p. 54.) On April 14, 2008, Dr. DuBose cautioned Claimant that, due to changes to his narcotic medication, he should avoid driving, making important decisions or operating dangerous machinery, *until Claimant became stable on these medications*. (C. Exh. 2, p. 68.) Dr. DuBose

referred Claimant to the Elks Balance Center on May 19, 2008. (C. Exh. 2, p. 69.) The Elks Balance Center discharged Claimant after two visits, due to Claimant not following up. (C. Exh. 5, p. 38.)

32. Around June 16, 2008, a horse kicked Claimant in the behind, causing a coccyx fracture. (C. Exh. 4, p. 12.) The coccyx fracture caused Claimant a lot of pain and made sitting difficult. (C. Exh. 2, p. 71.) Claimant's function began to decline, with increased difficulty ambulating, muscle spasms, and tenderness. (C. Exh. 2, p. 82.) By Claimant's December 10, 2009 self-report to Dr. DuBose, he could "do his work and chores around the housework easily." (C. Exh. 2, p. 83.) On March 18, 2010 and September 14, 2010, Claimant's pain level was stable, although he did complain of increased nausea. (C. Exh. 2, p. 90.) On April 12, 2011, Dr. DuBose drafted a medical release releasing Claimant from jury duty, noting that Claimant is unable to sit for long periods, requires frequent position changes and resting periods, and that his medication causes some dysfunction with his cognitive thinking abilities. (C. Exh. 2, p. 94.)

33. On July 18, 2008, Dr. Perkins, D.C., recommended significantly limited lifting and the amount of time spent on hard surfaces, i.e., concrete floors. Dr. Perkins did not anticipate that Claimant would recover in the near future or at all. However, Dr. Perkins did not indicate whether that opinion was based only on the December 2005 injury or Claimant's non-industrial conditions.

34. On July 15, 2008, Claimant applied for Social Security disability benefits. (ISIF Exh. 2, p. 44; Exh. 6, p. 127.) When questioned in the application about the illnesses, injuries, or conditions that limited Claimant's ability to work, Claimant listed "lumbar spine impairment, bulging discs and back pain." (ISIF Exh. 6, p. 129.) Claimant's other alleged preexisting conditions relating to his heart, pulmonary function, elbow or foot are notably absent from that

list. Claimant's application also reflects that his illnesses, injuries, or conditions first interfered with his ability to work on January 1, 2006. (ISIF Exh. 6, p. 130.)

35. On September 11, 2008, Dr. Dickey, a Social Security medical consultant, gave the following restrictions: occasional lifting up to 10 pounds, less than 10 pounds frequently; stand and/or walk with normal breaks 6 hours in an 8-hour day; sit with normal breaks about 6 hours in an 8-hour day; may push/pull unlimited other than as shown for lift and carry. Dr. Dickey assigned these restrictions based on back pain, obesity, a prior right knee injury, sleep apnea, and hypertension, but did not elaborate or specify how he reached those conclusions. (ISIF Exh. 6.) Dr. Dickey opined that Claimant retained the capacity for sedentary exertional activity. (ISIF Exh. 6, p. 166.) Claimant was eventually found eligible for Social Security disability benefits in 2009 in the amount of $922.00 monthly. (ISIF Exh. 2, p. 44; Exh. 6, p. 127.)

Claimant's Ongoing Medical Care

36. Since 2005, Claimant has lived on an acre and half. Claimant reported that prior to his 2005 industrial accident, he believed he could maintain his employment as a correctional officer, ride horses, golf, hike, ride bicycles, dig holes for fences on the acreage, and perform other chores. (HT, pp. 65-66.) Claimant testified that he must now hire out chores to maintain his property. (HT, p. 77.)

37. Throughout his life, Claimant has been overweight and has had difficulty managing his diabetes. On November 16, 2006, Claimant reported blurry vision in his left eye and was encouraged to see his ophthalmologist. (C. Exh. 21, p. 535.) Claimant had cataracts surgically repaired around December 2006. (C. Exh. 21, p. 224.) On October 2, 2008, Claimant reported "no complaints with distance vision. Having trouble with near vision." (C. Exh. 21,

p. 228.) Thereafter, Claimant sought a surgical correction for droopy eyelids and reported his eyes get "gritty" occasionally. (C. Exh. 21, p. 228.) On February 12, 2008, Anthony Millward, PA-C, recommended a consult with the Diabetic Retinopathy Surveillance Clinic to asses Claimant for diabetic eye disease. (C. Exh. 21, p. 249.)

38. Following his date of medical stability from his industrial accident, Claimant continued medical treatment with the Saltzer Medical Group with Dr. DuBose for management of his chronic pain associated with severe osteoarthritis of lumbar spine and lumbosacral disc disease. On October 20, 2011, Dr. DuBose reported "Since the last visit the patient denies new or worsening visual changes, blurred vision, cognitive changes, confusion, chest pain, shortness of breath, dyspnea on exertion, nausea, swelling, difficulty urinating, rashes, lesions, weakeness (sic), numbness. The patient admits to vomiting, unsteadiness of gait." (C. Exh. 22, p. 39.) On November 30, 2011, Claimant's "low back pain and radicular symptoms have improved since receiving the injections." (C. Exh. 22, p. 33.) On March 28, 2012, Dr. DuBose recorded that Claimant is short of breath and now on home oxygen, felt "zombielike" on methadone, but recently "he has become more active." (C. Exh. 22, p. 30.) In response to this appointment, Dr. DuBose adjusted Claimant's medications. On July 3, 2012 and August 3, 2012, Claimant reported no side effects due to his medications, although there were some difficulties with blood pressure. On September 4, 2012, Claimant was referred to the VA to address problems with blood pressure and dizziness. On the appointments of December 18, 2012; March 19, 2013; June 19, 2013; September 19, 2013 and December 19, 2013, Claimant's treating physician at Saltzer Medical Group, Rick Robert, M.D reported Claimant had chronic back pain, well managed with pain medications, and that "the pain medications are not causing any side effects. . . There is no sedation, confusion or other bad side effects to his medications. On evaluation today." (C. Exh.

22, p. 14.) Claimant made similar reports on March 19, 2014, June 19, 2014, and September 14, 2014. On September 14, 2014, Dr. Robert reported the same as above, that "the pain medications are not causing any side effects. The pain medications improve the patients (sic) physical activity. . . There is no sedation, confusion or other bad side effects to his medications. On evaluation today." (C. Exh. 22, p. 8.)

39. On March 3, 2011, Claimant's heart function showed congestive heart failure and small bilateral effusions. (C. Exh 21, p. 52.) Around 2014, Claimant was diagnosed with COPD and uses oxygen at night due to sleep apnea and congestive heart failure. (C. Exh 32, p. 5.) Claimant did not rely on oxygen at the Commission hearing.

Vocational Testimony

40. Following the subject accident, Claimant met with Don Thompson from the Industrial Commission Rehabilitation Department (ICRD). The case was transferred to IRCD consultant Teresa Ballard. Ms. Ballard reviewed Claimant's job duties as a correctional officer, conducted a job site evaluation, and had numerous contacts with Claimant, Employer and medical providers. (HT, p. 73; ISIF Exh. 1.) Around April 2006, Ms. Ballard noted Claimant's concerns about returning to work with the Department of Correction. On October 2, 2006, Ms. Ballard met with Claimant at his home and discussed job announcements as a customer service representative, a process server, as security, and as an operations supervisor. Ms. Ballard remained apprised of Claimant's medical treatments and provided additional job announcements to Claimant on April 13, 2007. On April 16, 2007, Ms. Ballard initiated job development with Claimant and provided Claimant with a variety of job leads. After a series of contacts, Claimant notified Ms. Ballard that he would defer his job search, because he sought another surgical procedure for his back. On June 19, 2007, Ms. Ballard closed the file because Claimant refused

ICRD services after reaching maximum medical improvement. Ms. Ballard opined that Claimant restrictions per Dr. Friedman's April 4, 2007 report (avoidance of prolonged low frequency vibration and avoidance of torquing maneuvers/combined bend/lift/twist), would allow him to obtain employment. Ms. Ballard opined that Claimant lost access to occupations requiring heavy physical activity, such as his time-of-injury position as a corrections officer. However, Claimant's job search would be successful based on his transferable skills from his time in law enforcement, customer service, production and pest technician experience, education, and training if he were to pursue a meaningful and focused job search. (ISIF Exh. 1, pp. 28-29, 37.) Ms. Ballard's wage loss analysis concluded that Claimant could readily restore his time-of-injury wage ($12.84/hour) and benefit level. (ISIF Exh. 1, pp. 29, 33; ISIF Exh. 3, p. 61.) Claimant made few attempts at re-employment. Claimant's reluctance to avail himself of jobs within the work restrictions imposed by his physicians does not reflect well on his motivation.

41. Claimant hired Nancy J. Collins, Ph.D., for vocational assessment. Dr. Collins' credentials are well-known to the Commission. Dr. Collins reviewed Claimant's medical records, interviewed Claimant, and completed a transferable skills analysis. Dr. Collins' somewhat reluctantly opined that Claimant could still obtain employment based on the restrictions from Dr. Friedman and Dr. Gustavel. However, when considering Claimant's subjective complaints, Dr. Collins opined that Claimant's medical and nonmedical factors made him totally and permanently disabled as of the time of hearing due to futility. Dr. Collins also opined that Claimant's disability was related to his preexisting lung and heart conditions combined with the back condition. (Collins' Depo., p. 13.) Dr. Collins understood that Claimant was having difficulties climbing stairs because of his heart and lung conditions while he worked for the private prison facility, resulting in Claimant's missing work. She opined that those

conditions would affect Claimant's ability to perform heavy-duty work. (Collins' Depo., p. 8.) Dr. Collins noted that Claimant appeared quite disabled, walking very slowly with a cane, and exhibited drowsiness, vision loss, and hearing issues.

42. ISIF retained vocational expert Douglas N. Crum, CDMS, to prepare a vocational report. Mr. Crum's credentials are well-known to the Commission. On August 5, 2015, Mr. Crum issued his report. Mr. Crum reviewed Claimant's medical records, interviewed Claimant, and completed a transferable skills analysis. Mr. Crum noted that no physician restricted or limited Claimant's work activities prior to his 2005 industrial injury for any of his preexisting conditions. While acknowledging that Claimant was hospitalized for his heart condition and had medical treatment for supraventricular tachycardia in the 1990s, his heart condition did not result in impairment or restrictions. Claimant completed various medium- to heavy-duty jobs in the decades to follow and even had a normal heart assessment study in 2003. Mr. Crum opined that he did not find Claimant totally and permanently disabled as a result of the 2005 industrial injury. Mr. Crum identified several job categories available to Claimant within Dr. Friedman's restrictions, including: security guard, cashier, stocker, production worker, light/medium delivery, and jailer. Mr. Crum also identified job openings appropriate for Mr. Mitchell using Dr. Friedman's restrictions. Because Dr. Friedman's restrictions were specifically recommended for Claimant's preexisting conditions, Mr. Crum could not conclude that the 2005 accident reduced Claimant's capacity for gainful activity or that the 2005 accident combined with preexisting conditions to render Claimant totally and permanently disabled. Mr. Crum also did not find Claimant totally and permanently disabled as of the time of hearing.

DISCUSSION

Statute of Limitation

43. Defendant argues that Claimant's receipt of settlement benefits does not toll the applicable statute of limitation and the Commission's prior ruling is inconsistent with Morton v. State of Idaho, Industrial Special Indemnity Fund, IC 2001-50412 (December 23, 2011). Defendant argues that the Commission erred in finding that Claimant's receipt of settlement funds more than six years after the initial accident constitutes the receipt of income benefits under Idaho Code § 72-706. In other words, because Claimant's claims against the Surety were resolved by lump sum settlement, Claimant should not be allowed to bring claims against the ISIF. Defendant argues that the Commission's ruling creates potentially an unlimited statute of limitations for claims made against the ISIF, and that the Commission should hold, consistent with Morton, supra, only one statute of limitation should apply to all parties in a claim.

44. Claimant urges the Commission to uphold its previous finding that the receipt of settlement benefits tolls the statute of limitation against the ISIF. Claimant argues that since the lump sum settlement agreement contemplates that the settlement was paid, in part, to compromise Employer/Surety's exposure for the payment of disability benefits, the payment of the settlement is the payment of an income benefit which implicates the provisions of Section 72-706(3).

45. The Commission abides by its previous ruling. Notwithstanding that the payment of the lump sum settlement resolved the claim against Employer/Surety, from the stand point of Section 72-706, that payment nevertheless constituted the payment of income benefits which makes the Complaint against the ISIF timely under Section 72-706(3). Vis-à-vis ISIF, income

benefits were paid to Claimant after the fourth anniversary of the claim, and a Complaint against the ISIF would therefore be timely if filed within one year of the date of those payments.

46. Therefore, Claimant's Complaint against the ISIF is timely.

Total and Permanent Disability

47. Permanent disability is defined and evaluated by statute. Idaho Code §§ 72-423 and 72-425 et. seq. Permanent disability is a question of fact, in which the Commission considers all relevant medical and non-medical factors and evaluates the purely advisory opinions of vocational experts. See, Eacret v. Clearwater Forest Indus., 136 Idaho 733, 40 P.3d 91 (2002); Boley v. ISIF, 130 Idaho 278, 939 P.2d 854 (1997). The proper labor market to consider in evaluating Claimant's disability is ordinarily the labor market in which Claimant resided at the time of hearing. Brown v. Home Depot, 152 Idaho 605, 609, 272 P.3d 577, 581 (2012). Whether Claimant has a permanent disability is a question of fact. Boley v. State Industrial Special Indemnity Fund, 130 Idaho 278, 280, 989 P.2d. 854, 856 (1997). Claimant bears the burden of proving that he has suffered a disability in excess of impairment. Seese v. Ideal of Idaho, Inc., 110 Idaho 32, 34, 714 P2d 1, 3 (1985). Claimant does not argue he is entitled to total and permanent disability under the 100% method; rather, Claimant argues that he is an odd-lot worker.

Odd-Lot

48. If a claimant is able to perform only services so limited in quality, quantity, or dependability that no reasonably stable market for those services exists, that worker is to be considered totally and permanently disabled. Id. Such is the definition of an odd-lot worker. Reifsteck v. Lantern Motel & Cafe, 101 Idaho 699, 700, 619 P.2d 1152, 1153 (1980); see also, Fowble v. Snoline Express, 146 Idaho 70, 190 P.3d 889 (2008). Claimant may prove odd-lot

status upon showing that a claimant has attempted other types of employment without success, by showing that the claimant or vocational counselors or employment agencies on the claimant's behalf have searched for other work and other work is not available, or by showing that any efforts to find suitable work would be futile. Lethrud v. Industrial Special Indemnity Fund, 126 Idaho 560, 563, 887 P.2d 1067, 1070 (1995). Boley, supra.; Dehlbom v. ISIF, 129 Idaho 579, 582, 930 P.2d 1021, 1024 (1997). Odd-lot status is a question of fact for the Commission to decide. Boley, supra.

49. Claimant cannot meet the first and second Lethrud methods of establishing total and permanent disability. Claimant cannot show that he attempted other types of employment without success, or that vocational counselors or employment agencies have searched for work on Claimant's behalf and found that the same is not available. Claimant deferred his job search despite assistance from IRCD consultant, Ms. Ballard. Further, Claimant retired from his time-of-injury employment, has been receiving Social Security Disability Benefits since 2009, and has not actively pursued employment opportunities. The third Lethrud method is futility. Claimant argues that he is totally and permanently disabled based on Dr. Collins' opinion that searching for a job would be futile. ISIF contends that Claimant was not totally and permanently disabled in 2007 or as of the date of hearing. Here, the Commission held a hearing on August 16, 2016—11 years after the 2005 accident, and almost a decade after Claimant was found medically stable by Dr. Friedman from the subject accident. Claimant disputes that he was medically stable in 2007, and asserts that his disability should be assessed as of the time of hearing.

50. This case is unique because of the amount of time that has passed between the subject industrial accident and the hearing, and the subsequent progression of Claimant's conditions. Claimant has not presented persuasive evidence that he remained in a period of

recovery following his 2007 date of medical stability. While the Commission acknowledges Claimant's additional medical care, the evidence does not persuade us that the need for such care is related to the industrial accident. Claimant settled his indemnity claim against Employer/Surety with a lump sum settlement, which the Commission approved on September 30, 2011. (ISIF Exh. 3.) In bringing his case against the ISIF, Claimant maintains that his disability should be evaluated as of the date of hearing. Brown, supra, establishes that the relevant labor market for evaluating an injured worker's disability is the labor market that exists as of the date of hearing. Claimant argues that per Brown, his disability must be evaluated based on his physical condition as it existed as of the date of hearing. We do not believe Brown supports this proposition. It is undeniably more advantageous for Claimant's disability to be assessed when he is a decade older, and a decade more enfeebled by the progression of his various conditions. Even if Claimant's health condition were static, aging a decade, alone, could decrease access to the labor market. Everyone enjoys the effects of time and entropy on their health. To endorse disability evaluation based on a Claimant's physical condition as of the date of hearing, a date that may be years, or even decades after medical stability, manipulates the reasoning of Brown in a way we cannot endorse. Wait long enough and every Claimant will be found totally and permanently disabled.

51. Claimant's arguments on the time of disability analysis are less convincing in the context of a case only against the ISIF. ISIF is not a Surety. Its statutory purpose is to encourage employers to hire handicapped persons with the assurance that the employer would pay the same for an employee who had not been handicapped, because the ISIF would assume responsibility for the contribution of the preexisting handicap's contribution to the total and permanent disability obligation. Commensurate with its purpose to encourage employers to hire

handicapped persons, the ISIF is not liable for any worsening in Claimant's condition attributable to nonindustrial causes following the last accident; ISIF liability arises from the Claimant's condition *prior to* the industrial accident and the remaining statutory elements contained in Idaho Code § 72-332. Therefore, the Commission finds that Claimant's disability is more appropriately measured as of his 2007 date of medical stability following his 2005 industrial accident, rather than the date of hearing.

52. The parties disagree as to the exact nature of Claimant's impairment-related medical restrictions and limitations. In all, the vocational expert testimony turns on the appropriate restrictions and time of disability analysis. While the Commission is sympathetic to Claimant's subjective concerns, the Commission concludes that his testimony regarding his abilities is not supported by other credible medical evidence of record, and that Claimant's actual functional capacity does not support a finding of total and permanent disability as of the date of medical stability. Dr. Collins acknowledged that if she considered the time of medical stability restrictions from Dr. Friedman and Dr. Gustavel without consideration of Claimant's subjective complaints, Claimant would be able to return to work, most likely in security work. Mr. Crum also opined that Claimant could return to work in various occupations based upon Dr. Friedman's medium work restrictions, such as security, line staff at a juvenile drug treatment facility, cashier, maintenance, cook/prep cook, janitorial, van driver, sales associate, and delivery or school bus driver positions. Ms. Ballard opined that Claimant's job search would be successful based on his transferable skills from his time in law enforcement, customer service, production and pest technician experience, education, and training if he were to pursue a meaningful and focused job search, and that Claimant could readily restore his time-of-injury wage and benefit level. (ISIF Exh. 1, pp. 28-29, 37.) The Commission is persuaded that

Claimant was not totally and permanently disabled as of the time of medical stability. Therefore, Claimant cannot prove ISIF liability.

53. For the sake of discussion, even if the Commission were to evaluate Claimant's disability at the time of hearing, it is still a close question whether Claimant would be totally and permanently disabled at the time of hearing given Claimant's advanced age and the fact that his medical conditions fluctuated over time. Claimant's vocational expert, Dr. Collins, opined that any efforts to find suitable work for Claimant would be futile based upon Claimant's self-reported subjective complaints regarding his ability to sit, stand, walk, bend, and lift—restrictions which exceed those of Claimant's treating physicians. Mr. Crum acknowledged that Claimant most likely "does have some limitations of his physical capacities, due especially to congestive heart failure, which has been a significant issue for him during the last couple of years." (ISIF Exh. 4, p. 97.) There has also been the progression of Claimant's hypertension, diabetes mellitus, and sustained use of pain medication. Mr. Crum was not under the illusion that finding a job would be quick and easy for Claimant, and certainly with retirement and Social Security Disability Benefits, it is less likely that Claimant is sufficiently motivated to improve his employment opportunities. Notwithstanding the obstacles, the Commission is persuaded that Claimant retains access to the labor market, and that Claimant would still not be totally and permanently disabled at the time of hearing, and that Claimant could work at a desk security job.

54. The Commission finds Claimant has failed to establish any of the three Lethrud requirements necessary to prove odd-lot status.

ISIF Liability

55. For the sake of discussion that Claimant is totally and permanently disabled, Claimant would still be required to satisfy the elements of ISIF liability outlined in statute.

Idaho Code § 72-332. The ISIF may be held responsible for some portion of that total and permanent disability if the following elements of ISIF liability are satisfied:

1) It must be demonstrated that claimant suffered from a preexisting physical impairment;

2) It must be shown that the impairment was manifest;

3) It must be shown that the impairment constituted a subjective hindrance to employment; and

4) It must be shown that the impairment combined with the industrial accident to cause total and permanent disability.

See Dumaw v. J.L. Norton Logging, 118 Idaho 150, 795 P.2d 312 (1990).

56. The timing of making the aforementioned assessment of the *prima facie* elements of a case against the ISIF has been addressed in Colpaert v. Larson's, Inc., 115 Idaho 852, 771 P2d 46 (1989). Colpaert was hired by Larson's in 1979. Prior to her date of hire, she was afflicted with a condition known as ataxia, a progressive neurological condition which attacks nerves and muscles throughout the body. Both Colpaert and her employer were aware of this condition at the time she was hired. Colpaert informed Larson's that she would not be able to perform work which required her to negotiate stairs or stand on her feet for long periods of time. Larson's nevertheless hired Colpaert with the intent of accommodating these restrictions. In December of 1982, Colpaert suffered a work-related injury to her right shoulder. Following surgery she returned to work in March of 1983. She was discharged in April of 1983 for reasons unconnected to her work injury. In June of 1983, Colpaert was given a 15% upper extremity rating for her shoulder injury. It was shown that Colpaert's ataxia was a progressive condition which worsened after she left her position with Larson's.

57. After a hearing on the merits, the Commission concluded that Colpaert's accident-produced impairment should be increased to 30% of the upper extremity. The Commission also concluded that the elements of ISIF liability had been satisfied for Colpaert's preexisting and progressive ataxia. The ISIF appealed, citing a number of errors. First, the ISIF argued that because Colpaert's preexisting ataxia was a progressive condition, she could not be deemed to have had a "permanent" physical impairment at the time of her industrial accident. The Court rejected this argument, concluding that the progressiveness of Colpaert's preexisting condition is irrelevant to the process by which Colpaert's permanent physical impairment is rated. The statute merely requires that the assessment of Colpaert's preexisting impairment be conducted at a point in time immediately prior to the work-related accident:

> In this case the Commission relied upon the testimony of Dr. Robert Burton, a neurologist hired by the surety to determine that Colpaert's ataxia produced an impairment of 30% of the whole man prior to December 12, 1982, the date of her shoulder injury. The rating of the permanent physical impairment is made at a point in time just prior to a claimant's industrial accident or injury. In other words, the rating is made, based on expert testimony, *at a specific point in time.* Thus, whether the condition is progressive or not does not impact this rating and the income benefits which flow from it.
>
> (Colpaert Decision at 4).

58. From Colpaert, it is clear that in determining whether the elements of ISIF liability are satisfied, a preexisting condition must be assessed as of the date immediately preceding the work injury. A snapshot of Claimant's preexisting condition must be taken as of that date, and from that snapshot Claimant's impairment must be determined, as well as whether Claimant's condition was manifest and constituted a subjective hindrance to Claimant. Finally, it must be determined whether Claimant's preexisting condition, as it existed immediately before the work accident, combines with the effects of the work accident to cause total and permanent disability. Colpaert lends no support to the proposition that in evaluating ISIF liability for a

preexisting but progressive condition, that condition should be assessed as of the date of hearing, i.e., at a time when Claimant's condition is much worse.

59. **Preexisting Physical Impairment.** Claimant's brief argues that he had a "host of pre-2005-accident physical limitations," including a painful foot, limited range of motion in his elbow, and chronic limitations related to his Wolff-Parkinson-White heart condition, hypertension and diabetes, including shortness of breath, blurred vision, inability to qualify for firearms use and limited ability to perform heavy labor in manual labor jobs, or continue as a sheriff's deputy. Claimant's answer in his interrogatories directly contradicts this assertion, as Claimant acknowledged he "did not suffer from any permanent physical impairment from any cause or origin prior to being employed by the employer." (ISIF Exh. 4, p. 97.) Although Claimant did have medical treatment for each of those conditions listed above, the record is devoid of evidence that any physician has proposed that Claimant was entitled to an impairment rating for any of these conditions immediately preceding the subject accident. Claimant's foot and elbow injuries never resulted in any physician-imposed impairment and did not factor into Dr. Collins' "combines with" analysis. (HT, p. 62). Similarly, no ratings for preexisting impairment exist for Claimant's Wolff-Parkinson-White heart condition or his hypertension and diabetes. Claimant's arguments are not assisted by using Claimant's condition in the years following his 2005 accident, such as his 2014 condition, to establish Claimant's *preexisting* physical impairments.

60. As discussed in Gormley v. South State Trailer and ISIF, 2016 IIC 009, the Commission is not inclined to use medical guides to formulate its own opinions regarding a claimant's health.

> In the recent case of Mazzone v. Texas Roadhouse, Inc., 154 Idaho 750, 302 P.3d 718 (2013), the Supreme Court made it clear that the Industrial Commission is not

> empowered to apply its own interpretation to medical guides in an effort to decide whether an injured worker qualifies for a particular diagnosis. In Mazzone, the referee assigned to the case reviewed the DSM-IV-TR manual in an effort to inform her evaluation of whether or not Claimant qualified for the diagnosis of PTSD. Though the DSM-IV-TR manual is referenced in Idaho Code § 72-451 dealing with psychological injuries, the manual had not been admitted into evidence in that case. Though noting that the Commission has wide discretion to consider reliable evidence that might not be admissible in a court of law, the Court cautioned that such medical treatises and guides must first be admitted into evidence through a witness able to testify as to their authority. Moreover, the Court ruled that the Commission is not entitled to use medical guides to assess claimants and formulate its own opinions regarding a claimant's health. The Court concluded that the referee improperly interpreted the DSM-IV-TR manual to arrive at an unqualified medical opinion. It is somewhat difficult to square the holding of Smith with the Court's direction in Mazzone. Perhaps the distinction lies in the fact that Mazzone, supra, involved an attempt by the Commission to apply a medical guide, while Urry, and its progeny, recognized the Commission's power to consider a variety of other factors in determining impairment. At any rate, we believe that this case is more like Mazzone than Urry, and we believe that Mazzone makes it very clear that the Commission is not itself empowered to apply and interpret the AMA Guides to the Evaluation of Permanent Impairment to assess the impairment of an injured worker. Impairment evaluation requires medical knowledge, and the Guides makes it clear that it is the intention of the editors that impairment evaluations performed pursuant to the guides be conducted by medical professionals. (See Guides to the Evaluation of Permanent Impairment, 6th Edition at 23.)
>
> Id.

61. Notwithstanding Claimant's testimony that he was limited or had self-adapted due to his conditions, other aspects of Claimant's testimony, his medical records, and work history contradict this depiction and demonstrate high functionality in medium and heavy-duty positions in the years preceding his 2005 industrial accident, as well as an active lifestyle. In accordance with Mazzone, supra, the Commission will not issue impairment ratings for these preexisting conditions as they existed immediately prior to the subject accident, where Claimant failed to adduce such evidence. Of the preexisting conditions listed, the Commission acknowledges that it is possible that Claimant may have been entitled to ratings for his WPW heart condition and diabetes, and perhaps less likely for the elbow (no restrictions, release to full recovery), and

painful foot (no restrictions, use of orthotic foot, ability to maintain active lifestyle). Claimant simply did not put on medical proof concerning what these ratings might have been immediately prior to the accident.

62. Dr. Friedman, as discussed above, opined that Claimant sustained 6% permanent partial impairment for his low back, which should be apportioned 50% to preexisting conditions. (ISIF Exh. 3, p. 62.) This evidence is persuasive. The Commission concludes that Claimant has a 3% preexisting impairment for his low back and an additional 3% referable to the subject accident. Therefore, it is only for Claimant's preexisting low back condition that he has demonstrated a preexisting impairment.

63. **Manifest.** "Manifest" means that either the employer or employee was aware of the condition so that the condition can be established as existing prior to the injury. See Royce v. Southwest Pipe of Idaho, 103 Idaho 290, 294, 647 P.2d 746, 750 (1982). Claimant argues that the following conditions were manifest—his painful foot, elbow, Wolff-Parkinson-White heart condition, hypertension, diabetes, and low back—as he obtained medical treatment for each condition. Claimant has established that these conditions were manifest.

64. **Subjective Hindrance.** The "subjective hindrance" prong of the test for ISIF liability is defined by statute**:**

> "Permanent physical impairment" is defined in section 72-422, Idaho Code, provided, however, as used in this section such impairment must be a permanent condition, whether congenital or due to injury or disease, of such seriousness as to constitute a hindrance or obstacle to obtaining employment or to obtaining re-employment if the claimant should become employed. *This shall be interpreted subjectively as to the particular employee involved, however, the mere fact that a claimant is employed at the time of the subsequent injury shall not create a presumption that the preexisting permanent physical impairment was not of such seriousness as to constitute such hindrance or obstacle to obtaining employment.*
>
> Idaho Code § 72-332(2) (emphasis added).

The Idaho Supreme Court set out the definitive explanation of the "subjective hindrance" language in Archer v. Bonners Ferry Datsun, 117 Idaho 166, 172, 686 P.2d 557, 563 (1990):

> Under this test, evidence of the claimant's attitude toward the preexisting condition, the claimant's medical condition before and after the injury or disease for which compensation is sought, nonmedical factors concerning the claimant, as well as expert opinions and other evidence concerning the effect of the preexisting condition on the claimant's employability will all be admissible. No longer will the result turn merely on the claimant's attitude toward the condition and expert opinion concerning whether a reasonable employer would consider the claimant's condition to make it more likely that any subsequent injury would make the claimant totally and permanently disabled. The result now will be determined by the Commission's weighing of the evidence presented on the question of whether or not the preexisting condition constituted a hindrance or obstacle to employment for the particular claimant.

65. Archer makes it clear that an injured worker's attitude towards a preexisting condition is but one factor to be considered by the Commission in determining whether or not the preexisting physical impairment constituted a subjective hindrance to Claimant. After Archer, the Commission is required to weigh a wide variety of medical and nonmedical factors, as well as expert and lay testimony, in making the determination as to whether or not a preexisting condition constituted a hindrance or obstacle to employment for the particular claimant.

66. With respect to Claimant's preexisting degenerative back condition, Claimant has offered conflicting testimony on whether this condition qualifies as a hindrance to Claimant. Claimant's employment required he pass physical tests, and Claimant was able to pass these tests and continue qualifying for his employment. Claimant had sporadic chiropractic treatment for his back, but again, was able to continue working without restriction. The Commission does not find Claimant's low back condition a subjective hindrance to Claimant's employment prior to the 2005 industrial accident.

67. With respect to Claimant's conditions that did not receive preexisting impairment ratings, including his diabetes, high blood pressure, and heart conditions, Claimant's testimony is

conflicting. Claimant argues that he was experiencing shortness of breath and had excessive absences, but also testified that he was performing his job tasks. Claimant's heart has been consistently monitored since his first episode of WPW, and his 2003 heart study from the VA Medical Center was normal. Claimant's vision complications from diabetes resulted in a VA ophthalmological consult, and cataract surgery in 2006, but Claimant did not receive physician-imposed restrictions due to his vision, or accommodations. While Claimant testified that he could not handle a firearm due to his vision issues and that led him to apply for a new position, he also testified that he was encouraged to apply for this guard position to improve his chances of advancement. The Commission does not have any contemporaneous documentation that Claimant's absences were excessive, or that Claimant sought or received accommodation from Employer for these conditions. Claimant has not satisfied the subjective hindrance element of ISIF liability.

68. **Combination.** Claimant must also prove that his preexisting permanent impairment combined with the subsequent industrial injury to cause total permanent disability. This test "encompasses both the combination scenario where each element contributes to the total disability, and the case where the subsequent injury accelerates and aggravates the preexisting impairment." Bybee v. State, Industrial Special Indemnity Fund, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996). "[T]he 'but for' standard … is the controlling test for the 'combining effects' requirement. …. The 'but for' test requires a showing by the party invoking liability that the claimant would not have been totally and permanently disabled but for the preexisting impairment." Corgatelli v. Steel W., Inc., 157 Idaho 287, 293, 335 P.3d 1150, 1156 (2014), rehearing denied (Oct. 29, 2014).

69. Claimant alleges that his preexisting physical limitations, including a painful foot condition, limited range of motion in his elbow, and chronic limitations related to his WPW heart condition, hypertension, and diabetes condition, *combines with* the 2005 back accident to render him totally and permanently disabled.

70. As discussed above, the impact of Claimant's preexisting conditions should be assessed immediately prior to the 2005 accident in accordance with Colpaert, supra.

71. The record shows that Claimant was not under any restrictions related to his preexisting physical impairments while working for Employer. Employer did not provide him with any accommodations in order to do his job, and Claimant was able to pass physical tests in which he was required to demonstrate the physicality necessary to take down a prisoner. While Claimant denigrates the results of those physical evaluations as an inaccurate depiction of his sustained physical capacity, Claimant's assertions are unsupported by the medical evidence and his employment history. For example, there is no indication in the record that Employer falsified or embellished the physical tests to allow Claimant to pass. Likewise, Claimant's assertions about his attendance record remain unsubstantiated; there is no documentation in the record concerning Claimant's attendance record, no documentation that Employer disciplined Claimant for having "excessive" absences, or documentation that Claimant sought FMLA accommodations or modified his schedule due to his medical conditions prior to the industrial accident. Rather, Claimant was successfully performing a medium to heavy duty job prior to his industrial accident. Claimant had no restrictions on his ability to sit, stand and walk eight to twelve hours per shift, no restrictions on or documented fatigue issues related to his heart condition or COPD. Claimant's medical records from the VA do not reflect that Claimant was fatigued or had issues with his cardiopulmonary function prior to the subject accident. (C. Exh.

21, pp. 375-509.) Even Claimant's representations in his Social Security Disability application support that Claimant was able to perform his job functions, ride horses, golf, hike, ride bikes, dig holes, load hay, and do other chores prior to his accident.

72. Claimant's vocational expert, Dr. Collins, opined that Claimant has satisfied the "combines with" element of ISIF liability. However, Dr. Collins' opinion inexplicably relies on Claimant's subjective beliefs without addressing Claimant's conflicting testimony, and Dr. Collins did not adequately address the multiple expert medical opinions from Claimant's physicians on Claimant's functionality which support the conclusion that Claimant's 2005 accident had a minimal impact on Claimant's functioning such that the 2005 accident did not contribute to his restrictions, or if there was some impact, it was modest. Dr. Collins was unaware of Claimant's deposition and hearing testimony that prior to his industrial accident he was able to buck hay, which is heavy exertional work, on his one and a half acres in Homedale, and there was no indication that the employer modified Claimant's job responsibilities as a correctional officer. Claimant was not receiving any type of medical attention for his lung condition prior to the industrial accident. Dr. Collins also did not clearly differentiate between Claimant's 2014 condition and his condition immediately preceding the accident in reaching her conclusions. For example, Dr. Collins opined on Claimant's most recent restrictions as if those same restrictions existed prior to the 2005 accident, which is not the case. Claimant did not have any physician-imposed restrictions for his diabetes, high blood pressure, COPD, or cardiac problems prior to the industrial accident. Claimant did not have any physician-imposed restrictions for lifting prior to the industrial accident. As to Claimant's complaints about the side effects of his medication, the record shows years of Claimant reporting to his treating physicians that he was not experiencing negative side effects.

73. Mr. Crum persuasively testified that Claimant's 2005 accident did not combine with his preexisting condition to render him totally and permanently disabled. Mr. Crum had a thorough understanding of the expert medical testimony and Claimant's past testimony and work history. Rather than attributing Claimant's present condition to his pre-2005 or 2005 accident-produced condition without a medical predicate, Mr. Crum appropriately discerned whether the medical experts attributed Claimant's restrictions to Claimant's pre-2005 restrictions, his 2005 accident-produced restrictions, or his subsequent restrictions. The Commission finds Mr. Crum's opinion to be well-reasoned and persuasive. Claimant has not met the "combines with" element of ISIF liability. ISIF is not liable for any of Claimant's permanent disability benefits pursuant to Idaho Code § 72-332.

CONCLUSIONS OF LAW AND ORDER

Based on the foregoing, it is hereby ORDERED that:

1. Claimant's Complaint against the ISIF is timely.

2. ISIF is not liable for any of Claimant's permanent disability benefits pursuant to Idaho Code § 72-332.

3. Apportionment of ISIF liability under the *Carey* formula is moot.

4. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 20th day of June, 2017.

INDUSTRIAL COMMISSION

____/s/_____
Thomas E. Limbaugh, Chairman

____/s/_____
Thomas P. Baskin, Commissioner

____/s/_____
R.D. Maynard, Commissioner

ATTEST:

___/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of June, 2017 a true and correct copy of the **FINDINGS OF FACT, CONCLUSIONS AND ORDER** was served by regular United States mail upon each of the following:

CLINTON MINER
MIDDLETON LAW, PLLC
412 S KINGS AVE, STE. 105
MIDDLETON, ID 83644

PAUL J AUGUSTINE
PO BOX 1521
BOISE ID 83701

___/s/_____